Supreme Court, U.S.
FILED
JUL 25 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1910

In The
Supreme Court of the United States
October Term, 1984

MICHAEL A. WILLIAMS,
Petitioner,

vs.

STATE OF DELAWARE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

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July 25, 1985

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TABLE OF CONTENTS

Page

Table of Authorities ii

Opinion Below 1

Jurisdictional Grounds 2

Counter Statement of the Case 2

Reasons for Denying the Writ:

1. Issues One, Two, Three, And Four Were Never Presented to the State Courts 7
2. No Compelling Reason Exists for this Court to Review the Sufficiency of the Evidence 10
3. The Trial Court's Investigation of the Jurors' Impartiality Complied with Decisions of this Court 10
4. No Reasons Exist for this Court To Make an Initial Determination Whether Williams Had the Effective Assistance of Counsel 10

Conclusion 11

TABLE OF AUTHORITIES

CASES:	Page
Cardinale v. Louisiana, 394 U.S. 437 (1969)	8
Collins v. State, 420 A.2d 170 (Del. 1980)	11
Duross v. State, — A.2d — (Del. June 13, 1985)	11
Hill v. California, 401 U.S. 797 (1971)	8
Illinois v. Gates, — U.S. —, 103 S.Ct. 2317 (1983)	8
McDonough Power Equipment, Inc. v. Greenwood, — U.S. —, 104 S.Ct. 845 (1984)	10
People v. Evans, 444 N.E.2d 7 (N.Y. 1982)	9
Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982)	9
Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963)	9
Smith v. Phillips, 455 U.S. 209 (1982)	10
Strickland v. Washington, — U.S. —, 104 S.Ct. 2052 (1984)	10
United States v. Baldacchino, 762 F.2d 170 (1st Cir. 1985)	9
United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980)	9
United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1884 (1983)	9
United States v. Hembree, 754 F.2d 314 (10th Cir. 1985)	9
United States v. Pellon, 475 F.Supp. 407 (S.D.N.Y. 1979)	9
United States v. Quartermain, Drax, 613 F.2d 38 (3rd Cir.), *cert. denied*, 446 U.S. 954 (1980)	9
United States v. Stirling, 571 F.2d 708 (2nd Cir.), *cert. denied*, 439 U.S. 824 (1978)	9

TABLE OF AUTHORITIES—Continued

Page

Webb v. Webb, 451 U.S. 493 (1981) 8

Williams v. State, 491 A.2d 1129 (Del. 1985) 1

STATUTES:

11 Del. C. § 3506 (1979) 4

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RESPONDENT'S BRIEF IN OPPOSITION

The State of Delaware, respondent, asks this Court to deny this petition to review the judgment and opinion of the Delaware Supreme Court entered March 8, 1985.

OPINION BELOW

The opinion of the Supreme Court of Delaware dated March 8, 1985, reproduced in the Pet. for Cert. App. E, is now officially reported at 491 A.2d 1129 (Del. 1985).

JURISDICTIONAL GROUNDS

Williams invokes jurisdiction pursuant to 28 U.S.C. § 1257(3) which permits this Court to review a state court decision if a federal constitutional claim has been "specially set up or claimed." To the extent that the language prescribes a jurisdictional limitation, this Court lacks jurisdiction over issues one, two three, four and eight. Those issues were not presented to the state courts.

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COUNTER STATEMENT OF THE CASE

1. The Robbery

In the morning of February 8, 1982, Michael Williams, in exchange for "gas money", agreed to drive Tyrone Baxter, a friend, from Dover, Delaware to a bus station at State Road, Delaware, approximately forty miles away. When Williams went to Baxter's home at around noon, Baxter introduced him to James Riley, indicating that he would also be going to the station. In the house, Baxter also showed Williams a box containing a pistol. Pet. for Cert. App. [App.] at 6a.

Within a few minutes after the trio started their trip to the station, Baxter asked Williams to stop at a liquor store. As they approached the store, Baxter and Riley said they had to get some money and spoke of doing a "hustle." While expressing his desire not to be involved, Williams drove to the liquor store. He did not park his car in the store's parking lot but on an adjacent street. As Baxter and Riley went into the store, Williams went to

"visit" a friend in a nearby apartment complex.[1] Not finding his friend at home, he returned to his parked car, waiting until Baxter and Riley returned. App. 7a. As they drove towards the bus station, Williams asked them what had happened. The two told him that they had taken some money and that Riley had shot the clerk. When Williams asked why Riley had to shoot the clerk, they detailed to him the events of the robbery. Trial Transcript [TTr.] 39 [App. 27a].[2] Williams drove Baxter and Riley to the depot, watching as they changed their clothes in a nearby clump of trees. After Baxter gave him twenty dollars for gas, Williams returned to Dover and went to work. App. 7a. For two months, while the police searched for the robbers, Williams never mentioned the March 8th events. TTr. 88 [App. 48a].[3]

2. The Co-operation Agreement

Ten weeks after the killing, after his mother had been questioned by the police, Williams retained an attorney. Defense counsel then contacted the local prosecutor in an effort to gain some favorable treatment for Williams in return for his co-operation. App. 7a.

In May, 1982, defense counsel and the prosecutor arrived at an agreement. Acting on the assumption that Williams was not the "triggerman" and had not entered

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1 Williams indicated he went to the apartment because "in case something ever happened, I wouldn't be involved." Prosecution's Trial Exhibit (S. Exh.) 7 at 319 [App. 74a].

2 The robbery netted $150.

3 Several days after the killing he told Baxter's mother that her son was not involved. He also visited with Baxter in Baltimore. TTr. 107-108 [App. 60a-61a].

the store, the prosecutor agreed not to prosecute him for murder. In return, Williams promised to give a statement concerning the events of February 8th and to testify against the other individuals.[4] The prosecutor declined to make any present agreement concerning the robbery and conspiracy charges. Rather, the parties agreed that if Williams, after giving his statement, "passed" a polygraph examination on his assertions that he had no knowledge that a robbery or murder was to be committed when he drove to the liquor store, the other two charges would be dropped. However, if the polygraph showed deception, the prosecution would proceed on all the charges. The parties expressly agreed that if the latter condition occurred, any statements given by Williams could be used against him. App. 7a-8a.

Pursuant to this agreement, Williams, with his attorney, went to the prosecutor's office on May 8, 1982 to give his statement. There, defense counsel outlined, "on the record," the terms of the agreement, repeatedly warning Williams that he had agreed, under the terms of the bargain, that the statements he would give could be used against him in any robbery and conspiracy charges if he "failed" the polygraph examination. App. 8a.[5] Williams acknowledged that he understood that condition. He then lied to the prosecutor, telling him he had parked in front of the liquor store and denying that he had heard any talk

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[4] While the original written agreement spoke of granting "use and transactional immunity" on the homicide, the crux of the agreement was the prosecution's promise not to prosecute. In Delaware, only a court may grant transactional immunity. 11 Del. C. § 3506 (1979).

[5] Immunity Transcript, App. 85a-87a, 90a-92a.

of a robbery during the trip to the bus station.[6] At the subsequent polygraph examination, Williams showed deception in his responses concerning his prior knowledge of the robbery.

With the agreement voided by Williams' deception, the prosecution, on June 8, 1982 charged him with murder, robbery, and conspiracy. However, in December, 1982, when Williams testified for the prosecution in the trial of Riley for murder, the prosecution dismissed the murder count, leaving only the robbery and conspiracy charges.

3. The Trial

Prior to his own trial on those two remaining charges, Williams moved to suppress the statement he had given the prosecutor on May 8, 1982. Conceding that his statement was given "voluntarily,"[7] Williams urged that it should be excluded under Delaware Rule of Evidence 410,[8] as a statement made in connection with an offer to plead guilty. The trial court denied the motion, holding that Williams had waived the exclusionary provisions of the evidence rule.

At his trial, the prosecution, without objection, offered a transcript of his testimony at the Riley trial. The admitted portion did not contain Williams' May 8th state-

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6 Williams does not dispute that this information was false. Pet. for Cert. at 12.

7 Suppression Hearing Transcript at 18. Williams made no motion prior to trial to dismiss the robbery and conspiracy charges based on any prosecution breach of the cooperation agreement.

8 App. 119a.

ment but did include his testimony that he had met with the prosecutor on that day and that he had lied when he had spoken to him. S. Exh. 7 at 324-333 [App. 77a-83a]. During his direct examination, Williams affirmed that he had gone to the prosecutor's office to co-operate but that he had not told him the whole truth. TTr. 82-85 [App. 45a-47a]. On cross-examination, the prosecutor also referred to his prior lies in the May 8th meeting. TTr. 90-95, 109-110 [App. 51a-53a, 59a-60a]..

4. The Juror Inquiry

After the jury had returned guilty verdicts, Williams attacked the jury, alleging that several jurors were partial and had deliberately lied during *voir dire*. In support of his major allegations, he offered the testimony of Paulette Winkfield who had testified as a defense witness. Winkfield claimed that one seated juror, Rebecca Perry, knew her mother, her, and Baxter's mother. In addition, Winkfield said that another juror, Walter Abrams, knew her family and possibly knew Baxter's mother.[9]

Concerned about the allegations, the trial judge recalled the two challenged jurors and, in the presence of counsel, questioned them. Perry denied knowing Winkfield, her mother, or any of the Baxters. While Abrams did admit that he recognized Winkfield's face when she testified and had met her mother on several occasions, he denied knowing Baxter's mother. Moreover, he indicated that none of his previous "contacts" with Winkfield or her mother affected the weight he had given the former's testimony.

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[9] Contrary to Williams' recital, Pet. for Cert. at 6 & 18, there was no allegation that any juror knew Riley.

Having observed the demeanor of Winkfield and the two challenged jurors, the trial judge found that Winkfield's assertions as to Perry's relationships were incredible. Secondly, he determined that Abrams did not know Baxter's mother. Finally, he held that while Abrams may have had a casual acquaintance with Winkfield's family, he had not deliberately lied during *voir dire* and had been an impartial juror.

5. The Appeal

Williams then appealed to the Delaware Supreme Court arguing (1) that the trial court erred, under the state's code of evidence, in not suppressing mention of his May 8, 1982 meeting; (2) that the evidence was insufficient to establish Williams' culpability as an accomplice and conspirator to the robbery; and (3) that the trial judge failed to adequately explore juror Abrams' contacts with Winkfield and her mother.[10] The Supreme Court affirmed his convictions.

REASONS FOR DENYING THE WRIT

1. Issues One, Two, Three, and Four Were Never Presented to the State Courts

As Williams concedes, issues one through four, concerning the nature and scope of the "immunity" bargained for between the prosecutor and defense counsel, were not presented to either the state trial court or the Delaware

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[10] Williams made no challenge on appeal to the trial judge's findings concerning juror Perry.

Supreme Court. Pet. for Cert. at 6-7. Indeed, he acknowledges that no federal constitutional claim challenging the agreement and the subsequent statement was made in the state courts. Pet. for Cert. at 26.

Williams seeks to avoid this failure by arguing that because the "immunity" issues are "purely legal issues that require no additional fact development," this Court should exercise jurisdiction. Pet. for Cert. at 7-8.

This Court has repeatedly held that, in light of the language 28 U.S.C. § 1257, it will not, except in the most unusual circumstances, review federal constitutional questions not presented to the state courts. *See, e.g., Illinois v. Gates,* —U.S.—, 103 S.Ct. 2317, 2321 (1983); *Hill v. California,* 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438-39 (1969). The rule is based, in part, on the concern that the record will be inadequate for review where the parties had not focused on the issues below. However, it is equally motivated by the principles of comity inherent in our federal system, which require that state courts be initially given an opportunity to review the constitutionality of the actions of state officers. *Gates,* 103 S.Ct. at 2323; *Cardinale,* 394 U.S. at 439; *Webb v. Webb,* 451 U.S. 493, 501 (1981). Those concerns of comity require that Williams' petition be denied.

Moreover, most courts which have considered arguments similar to the ones now advanced by Williams have reached results opposite from that proposed by him. Thus, they have held that statements given as part of a negotiated agreement, in which the defendant, with the aid and the advice of counsel, has sought leniency in the charges to be brought, do not constitute "compelled" testimony. *See,*

e.g., United States v. Davis, 617 F.2d 677, 686-87 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980); *United States v. Hembree*, 754 F.2d 314, 316-17 (10th Cir. 1985); *People v. Evans*, 444 N.E.2d 7, 11 (N.Y. 1982). *See also United States v. Quartermain, Drax*, 613 F.2d 38, 41 (3rd Cir.) (recognizing difference between formal immunity and negotiated agreement not to prosecute), *cert. denied*, 446 U.S. 954 (1980); *United States v. Pellon*, 475 F.Supp. 467, 479-80 (S.D.N.Y. 1979) (same). Moreover, the courts have recognized that in such cases of prosecutorial promises of leniency the prosecutor may properly limit the scope of the charges he will not prosecute, *United States v. Gutierrez*, 696 F.2d 753, 755-56 (10th Cir. 1982), *cert. denied*, —U.S.—, 103 S.Ct. 1884 (1983), and temper his promise on the condition that the defendant truthfully co-operate. *United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *United States v. Hembree*, 754 F.2d 314, 316-17 (10th Cir. 1985); *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir. 1982). *Cf. Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 349-351 (1963) (promise of no prosecution voided by deceptive disclosures). Finally, under such prosecutorial agreements, the prosecution may constitutionally use statements given pursuant to such agreements where the defendant subsequently breaches its terms, particularly where the agreement provides for their use in such an evantuality. *United States v. Stirling*, 571 F.2d 708, 732 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978); *Davis*, 617 F.2d at 687; *Evans*, 444 N.E.2d at 11.

2. No Compelling Reason Exists for this Court to Review the Sufficiency of the Evidence

Because Williams does not argue that the Delaware Supreme Court utilized any erroneous standard when it reviwed the sufficiency of the evidence concerning his liability for robbery and conspiracy, Pet. for Cert. at 16, there is simply no need for this Court to undertake an independent review.

3. The Trial Court's Investigation of the Jurors' Impartiality Complied with Decisions of this Court

When confronted with Williams' allegations that two jurors might have lied during *voir dire* examination and may have known several witnesses, the trial court, consistent with this Court's decisions in *Smith v. Phillips,* 455 U.S. 209 (1982) and *McDonough Power Equipment, Inc. v. Greenwood,* —U.S.—, 104 S.Ct. 845 (1984), conducted a hearing, including questioning of the jurors. Particularly in light of the mistaken assertions in Williams' petition concerning the nature of the challenges to the jurors, Pet. for Cert. at 18-20, there is no reason to have this Court to review the accuracy of the trial judge's conclusions based on his first-hand observation of the involved jurors.

4. No Reason Exists for this Court to Make an Initial Determination Whether Williams had the Effective Assistance of Counsel

Williams asks this Court to make the initial determination, under the two-pronged test of *Strickland v. Washington,* —U.S.—, 104 S.Ct. 2052 (1984) whether he received the effective assistance of counsel. Pet. for Cert. at 20-26. The claim has not been previously presented to

the state courts. Here, where the Delaware courts have held that such claims may be brought in a collateral post-conviction proceeding,[11] there is no reason for this Court to grant review.[12]

CONCLUSION

This petition for a writ of certiorari should be denied.

July 25, 1985

Respectfully submitted,

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11 *See Duross v. State*, — A.2d — (Del. June 13, 1985); *Collins v. State*, 420 A.2d 170, 177 (Del. 1980).

12 Williams also asks this Court to review the Delaware court's interpretation of state evidence Rule 410. Pet. for Cert. at 17. This Court clearly has no power to review the correctness of a decision concerning the scope of a local court rule.